

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Sheryl Hill,

Complainant,

vs.

ORDER DENYING COMPLAINANT'S
REQUEST TO VACATE THE
ORDER OF DISMISSAL

Tom and Cindy Notch, Citizens for
Common Sense, and Wake Up
Westonka,

Respondent.

The above-entitled matter came on for a probable cause hearing on October 23, 2006, before Administrative Law Judge Eric L. Lipman to consider a complaint filed by Sheryl Hill on October 17, 2006. The hearing was held by telephone conference call and the record with respect to the probable cause hearing closed on October 25, 2006, with the filing of a post-hearing submission from Respondents.

Because Complainant requested an opportunity to be heard on the substance of Respondent's post-hearing submission, and asserted further that her reply would demonstrate why the earlier Order dismissing her claims was in error, the undersigned Administrative Law Judge permitted a reopening of the record in order to receive a responsive post-hearing submission from the Complainant. A post-hearing submission was received from Complainant on October 31, 2006, and the record closed on that date.

Sheryl Hill (Complainant), 1220 Morningview Drive, Mound, MN 55364, participated on her own behalf without counsel. Tom and Cindy Notch of Citizens for Common Sense (Respondents), 1250 Morningview Drive, Mound, MN 55364, participated for themselves without counsel.

ORDER

IT IS HEREBY ORDERED:

1. Complainant's request to vacate the Order of Dismissal is DENIED.
2. That there is no probable cause to believe that Respondents violated Minnesota Statutes §§ 211A.02 and 211B.06, as determined in the Order of October 27, 2006, and therefore the Complaint is DISMISSED.

Dated: November 3, 2006

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings **within two business days** after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

MEMORANDUM

This campaign violation case has been the subject of two earlier Orders, setting forth a detailed discussion of the underlying facts, which, for brevity sake, will not be revisited here. Instead, it is presumed that the readers of this Order are likewise familiar with the earlier writings in this matter.

While the Complainant's post-hearing submission is thorough – and includes very detailed exchanges between the Respondents and Westonka School District officials on the likely future tax impact of the proposed referenda – it does not establish that vacating or amending the prior Dismissal Order is warranted. Notwithstanding the detail of the various post-hearing submissions, the dispute between the parties can be simply stated: On the one hand, Complainant and School District officials are of the view that, in the future, there will be fairly modest growth in the capped amounts that School Districts may levy for operating costs, and more robust growth in the overall tax capacity within the Westonka School District. On the other hand, Respondents believe that the Legislature will quickly authorize the Westonka School District (and other locales as well) to markedly increase the amounts that can be levied for operating costs, and that the overall growth in the tax capacity of the Westonka School District will be fairly modest. Both forecasts draw inferences from other facts.

As noted in the October 27 Order of Dismissal, to say that the Respondents' forecasts of future legislative action and growth in tax capacity are gloomy, unrealistic or improbable, is not to say that they are demonstrably false. There is a difference. The Fair Campaign Practices Act does not prohibit Respondents from disseminating campaign material that others regard as pessimistic or uncharitable.

To this point, the Minnesota Supreme Court's discussion in *Kennedy v. Voss*, is instructive. In that case, an incumbent County Commissioner complained that his opponent disseminated literature which unfairly characterized his support for programs serving the elderly. The challenger, citing

the incumbent Commissioner's vote against the entire County Budget, which included funding for programs serving the elderly as well as many other appropriations, asserted that the incumbent "is not a supporter of programs for the elderly."^[1] The incumbent maintained that there were other votes, not cited in the challenger's literature, which made the incumbent's support of the referenced programs clear.

While the Justices of the Minnesota Supreme Court might not have shared the challenger's assessment of the incumbent's voting record, or agreed with his reasoning, the Court held that the challenger was legally entitled to share his assessment with the wider electorate. As Chief Justice Sheridan summarized:

In this case, [the challenger] used a fact, respondent's "no" vote on the county budget vote, to infer that respondent did not support any of the individual items in that budget. Although the inferences made by the [challenger] may be considered extreme and illogical, they do not come within the purview of the statute. The public is adequately protected from such extreme inferences by the campaign process itself. For example, in this case, the [incumbent Commissioner] distributed two flyer's rebutting the [challenger's] remarks. The voters of Dakota County had every opportunity to judge for themselves what inferences could be properly drawn from the record of the candidates.

This case is similar: Because nothing in the record shows that the Respondents' forecasts are demonstrably false, and circulated with some awareness of that falsity, they are not items that the State may reach, regulate, outlaw or punish. Whether or not Respondents' predictions of future tax impact are reliable are matters that are committed to the judgment and sound discernment of the voters within the Westonka School District.

There is not a basis to vacate the October 27, 2006, Order of Dismissal. The Complainant's request is denied.

E.L.L.

^[1] See, *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).